

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 237791
Wayne Circuit Court
LC No. 00-009628

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of and sentences for third-degree fleeing and eluding a police officer, MCL 257.602a(3), and carrying a concealed weapon in a vehicle, MCL 750.227, entered after a jury trial. We affirm defendant's convictions, vacate his sentences, and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial the evidence showed that defendant's vehicle ran two red lights, and subsequently attempted to flee when the police signaled the vehicle to stop. The vehicle entered a construction zone, struck another vehicle, struck the embankment, and rolled over onto the freeway. A passenger exited defendant's vehicle and fled the scene. The police found a pistol on the ground next to the driver's side door. Defendant identified the passenger; however, a search for the passenger based on defendant's information was unsuccessful.

Defendant testified that when the police signaled him to pull over, his passenger, Dana Smith, pointed a gun at him, fought him for control of the vehicle, and forced him to flee the scene. Defendant acknowledged that he had lied to the police in the past, but maintained that he was telling the truth at trial. He stated that at the time of the incident he saw Smith three to four times per week, but that he had not talked to him since the incident occurred.

During closing argument the prosecutor characterized defendant's assertion that Smith forced him at gunpoint to flee the scene as a lie. The prosecutor noted that defendant admitted that he had lied to the police in the past, and asserted that if defendant was being truthful when he stated that he saw Smith three to four times per week, defendant would have made an effort to find Smith. Defense counsel did not object to the prosecutor's argument.

The jury found defendant guilty as charged. The statutory sentencing guidelines as corrected by the parties and the trial court recommended a minimum term range of zero to eleven months. The trial court sentenced defendant to concurrent prison terms of seven months to five years, with credit for seven days. The trial court stated only that it did not feel that defendant was a suitable candidate for probation.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

A prosecutor may not shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). A prosecutor may contest evidence presented by the defendant, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), and may argue from the facts and evidence that the defendant is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant argues that the prosecutor's assertion that he had a duty to produce Smith improperly shifted the burden of proof and denied him due process and a fair trial. We disagree and affirm defendant's convictions. Defendant did not object to the prosecutor's argument; therefore, reversal is warranted only if defendant can demonstrate the existence of plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor's argument that defendant's version of the incident was not worthy of belief in light of defendant's admitted lack of veracity in the past and the undisputed evidence that Smith could not be located based on information provided by defendant was proper. *Reid*, *supra*; *Launsbury*, *supra*. The prosecutor did not assert that defendant had a duty to produce Smith in order to prove his version of the incident, and thus did not improperly shift the burden of proof to defendant. *Fields*, *supra*. However, even assuming *arguendo* that the prosecutor's argument created such an inference, any prejudice could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred. *Carines*, *supra*.

Under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less, MCL 769.34(4)(a), but does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000).

Defendant argues that he is entitled to resentencing because the trial court neither imposed intermediate sanctions nor stated substantial and compelling reasons for imposing

prison terms. MCL 769.34(4)(a). We agree, vacate defendant's sentences, and remand for resentencing. A "departure" is a sentence "that is not within the appropriate minimum sentence range established under the sentencing guidelines." MCL 769.31(a). Because defendant's recommended minimum sentence range did not exceed eighteen months, the trial court was required to impose intermediate sanctions unless it found on the record that substantial and compelling reasons existed to sentence defendant to prison. MCL 769.34(4)(a). In imposing sentence the trial court remarked only that it did not feel that defendant was a suitable candidate for probation. On this record, we cannot determine if the trial court failed to recognize that the sentences imposed constituted a departure from the guidelines, or if it determined that defendant's lack of suitability for parole constituted a substantial and compelling reason for departing from the guidelines. Resentencing is required under the circumstances. MCL 769.34(11). On remand, the trial court may impose intermediate sanctions or sentence defendant to prison if it finds on the record that a substantial and compelling reason exists to do so. *Babcock, supra*, 80.

Defendant's convictions are affirmed, his sentences are vacated, and this matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray